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Citation: 2009 PSLRB 70

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

HÉLÈNE GALARNEAU ET AL.

Grievors

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
Galarneau et al. v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication under section 209 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Marie-Josée Bédard, adjudicator

For the Grievors: John Mancini, counsel

For the Respondent: Nadia Hudon and Nadine Perron, counsel

Heard at Montreal, Quebec,
March 27, 2009 (written arguments submitted April 2, 2009).
(PSLRB Translation)

I. Individual grievances referred to adjudication

[1] I am seized of 58 grievances filed between July 27, 2005 and April 6, 2006. The 58 grievors ("the grievors") work for the Correctional Service of Canada ("the employer") and filed similar grievances, which have been grouped for the purposes of adjudication. The grievances read as follows:

> [Translation]
>
> *Since 1989* [the year varies from one grievance to another] *my employer has exposed me to second-hand smoke in my workplace, even though the toxicity of tobacco is well known. The situation has caused me health risks, health problems, stress, tension, worry, inconvenience and discomfort. My quality of life at work has deteriorated markedly, and my personal quality of life has been affected. The employer has not taken measures to eliminate second-hand smoke in the workplace. The employer is violating clause 18.01 of the collective agreement, the* Non-smokers' Health Act, *the* Canadian Charter of Rights and Freedoms *(sections 7 and 15), and the* [Quebec] Charter of human rights and freedoms.

[2] The grievors have requested the following corrective action:

> [Translation]
>
> *Order the employer to take the necessary measures to eliminate second-hand smoke in my work environment. Order the payment of $10,000 in damages and interest for physical and psychological harm caused by the employer's negligence and failures. Order the payment of $20,000 in punitive or exemplary damages and interest for violating the* Canadian Charter of Rights and Freedoms.

[3] These grievances are part of a debate that began in 2004. That year, one of the grievors, Hélène Galarneau, filed an application seeking a class action suit in Federal Court against the Attorney General of Canada and the Correctional Service of Canada on behalf of all correctional officers working in federal penitentiaries in Quebec who were being exposed to second-hand smoke. The complaints raised in the suit were essentially the same as those set out in the grievances. A debate then followed about the Federal Court's jurisdiction to hear the dispute. In *Galarneau v. Canada (Attorney General)*, 2004 FC 718, the prothonotary of the Court allowed a motion to strike the statement of claim. Being of the opinion that the dispute arose from Ms. Galarneau's conditions of employment, the prothonotary concluded that the Federal Court did not

have jurisdiction and that Ms. Galarneau should use the mechanisms provided in her collective agreement and in the *Canada Labour Code* ("the *Code*"). The Federal Court upheld that judgment in *Galarneau v. Canada (Attorney General)*, 2005 FC 39, to which I will return.

[4] The employer raised a first preliminary objection to the jurisdiction of an adjudicator, arguing that the grievances had not been filed within the time limit set out in the collective agreement (between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN for the Correctional Services group; expiry date May 31, 2002) ("the collective agreement"). I dismissed that objection in 2009 PSLRB 1.

[5] This decision deals with a second objection raised by the employer to the jurisdiction of an adjudicator.

[6] The employer argues that, under subsection 208(2) of the *Public Service Labour Relations Act* ("the *Act*"), the grievors were not entitled to file grievances because other administrative procedures for redress are provided under other Acts of Parliament that could be used to resolve the dispute raised in the grievances. As an alternative, the employer argues that clause 18.01 of the collective agreement does not create substantive individual rights that could be used as the basis for individual grievances.

[7] The parties did not call witnesses and limited their submissions to arguments of law, which were heard at the hearing on March 27, 2009. On April 2, 2009, the employer sent me two additional decisions in support of its position. Counsel for the grievors, who was given until May 1, 2009 to reply or comment, did not submit any further comments or authorities.

II. Summary of the arguments

A. For the employer

[8] The employer's main argument relates to subsections 208(1) and (2) of the *Act*, which read as follows:

> ***208.****(1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*

> *(*a*) by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award; or*
>
> *(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.*
>
> *(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act.

[9] The employer argues that subsection 208(2) of the *Act* prevents an employee from filing an individual grievance if an administrative procedure for redress exists under an Act of Parliament that covers the matter in dispute. When subsection 208(2) of the *Act* applies, the administrative procedure becomes the exclusive process, and an adjudicator must decline jurisdiction. The employer also bases its position on clause 20.02 of the collective agreement, which provides the same restriction. That clause reads as follows:

> ***20.02*** *Subject to and as provided in section 91* [now replaced by section 28] *of the* Public Service Staff Relations *Act, an employee who feels that he or she has been treated unjustly or considers himself or herself aggrieved by any action or lack of action by the Employer in matters other than those arising from the classification process is entitled to present a grievance in the manner prescribed in clause 20.05 except that:*
>
> *(a) where there is another administrative procedure provided by or under any Act of Parliament <u>to deal with the employee's specific complaint</u>, such procedure must be followed*
>
> . . .
>
> [Emphasis added]

[10] The employer argues that, to determine whether subsection 208(2) of the *Act* applies to a given situation, the purpose and nature of the grievance must be

determined. To do so, it is necessary to refer to the grievance's actual wording. In this case, it is clear from the wording of the grievances that the employees allege that they have suffered health problems or physical and psychological harm because of exposure to second-hand smoke, and they seek compensation for their alleged suffering. The exposure to second-hand smoke allegedly arises from the employer's failure to take measures to protect their health and safety in the workplace and constitutes a violation of various federal statutes. The employer argues that there are administrative procedures for redress to deal with the grievors' complaints under the following three statutes: the *Government Employees Compensation Act* (R.S.C. 1985, c. G-5)) ("the *GECA*"), the *Non-smokers' Health Act* (R.S.C. 1985, c. 15 (4th Supp.)) ("the *NSHA*") and the *Code*.

[11] The employer argues that Parliament does not require that the recourse and the redress contained in the administrative procedures and the adjudication process be identical for the administrative procedure to apply exclusively. Parliament indicated that the administrative procedure must provide redress, which does not require that the solutions to a problem be identical. The employer also submits that the fact that the employees did not use the recourse procedures is not relevant because the test of whether subsection 208(2) of the *Act* applies is the existence of such administrative procedures for redress, regardless of whether the employees have used them.

[12] The employer set out its position with respect to each of the three statutes. It argues that the purpose of the *GECA* is to compensate employees who are victims of an employment accident or industrial disease attributable to the nature of their work according to the rates and conditions set out in the statutes of the province in which the government employees carry out their functions, which in this instance is *An Act respecting industrial accidents and occupational diseases*, R.S.Q. c. A-3. The employer argues that the *GECA* provides a fault-free, comprehensive and exclusive compensation plan and that these provisions must be given a broad and liberal interpretation.

[13] According to the employer, the allegations and claims in the employees' grievances reflect the purpose and parameters of the *GECA* because the employees claim that exposure to second-hand smoke caused them health problems and psychological stress. An employee who alleges to have suffered health problems during the course of or because of his or her work and who claims compensation must do so under the *GECA* and not through a grievance.

[14] The employer also relies on section 12 of the *GECA*, which disallows claims against the Crown. It reads as follows:

> ***12.*** *Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.*

[15] The employer argues that that provision clearly indicates that the immunity applies regardless of whether the employee has exercised his or her rights under the *GECA* and that it excludes all recourse, through a grievance or otherwise, to any claim for compensation that would exceed the parameters of the *GECA*. The employer also referred me to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, which also grants the Crown immunity.

[16] Second, the employer argues that the purpose of the grievances is covered by the *NSHA*, which governs the use of tobacco in the workplaces of federal employees. That statute sets out strict rules with respect to the places where smoking is permitted and requires the employer to ensure that no one smokes in a workplace under its authority. In their grievances, the employees directly invoke a violation of that *Act* by the employer. The *NSHA* provides a complaint mechanism and penal offences in the event of a violation of its provisions. In this instance, those provisions would constitute a redress mechanism within the meaning of subsection 208(2) of the *Act*.

[17] Third, the employer argues that the purpose of the grievances is covered by Part II of the *Code*, which provides a comprehensive legislative framework with respect to occupational health and safety. The employer refers me, in particular, to section 122.1 of the *Code*, which states that "[t]he purpose of [Part II of the *Code*] . . . is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies." The employer points out the *Code*'s regime, which sets out clear obligations for employers to protect their employees with respect to occupational health and safety and provides a number of recourse mechanisms for employees who believe that the employer is contravening its obligations. The employer refers specifically to the complaint mechanism provided in section 127.1 and to the right to refuse to work if there is danger, provided in section 128. Under those mechanisms, a health and safety officer may instruct the employer to terminate any

contravention of its obligations within the time the officer specifies. The *Code* also provides for an appeal mechanism and a criminal offence regime.

[18] According to the employer, Part II of the *Code* is the best mechanism for resolving issues and situations that, as in this case, involve health and safety in the workplace. The *Code* provides effective measures for resolving any violation of the employer's occupational health and safety obligations.

[19] The employer relies on *Forster v. Canada Revenue Agency*, 2006 PSLRB 72, in support of its arguments. Although that decision was rendered under the former *Public Service Staff Relations Act* ("the former *Act*"), the employer argues that the principles in that case are applicable to this case because section 91 of the former *Act* provided the same exception as that set out in subsection 208(2) of the *Act* when another administrative procedure was available to the employee. In *Forster*, the employees had refused to work because they felt that they were exposed to dangerous conditions in the workplace, and they sought, through the grievance process, payment of their salaries for the period in question. The adjudicator declined jurisdiction on the grounds that the matter at issue fell under Part II of the *Code*. The employer referred me specifically to the following paragraph from that decision:

. . .

> *[29] Considering these provisions in the circumstances of this case, I conclude that the right to refuse unsafe work is contained in the* Canada Labour Code. *Further, as contemplated by section 91 of the* PSSRA, *section 133 of the* Canada Labour Code *provides an "administrative procedure for redress" for this right. The logic of these provisions is that I am without jurisdiction to hear a complaint about the right to refuse unsafe work. That matter is properly the subject of a complaint before the Board under sections 128 and 133 of the* Canada Labour Code *and it is not one that I am authorized to consider as an adjudicator under the* PSSRA.

. . .

[20] The employer further argues that the case law developed under the former *Act* on human rights issues is relevant for the purposes of interpreting subsection 208(2) of the *Act* and that it shows that adjudicators have not applied the exception of the exclusivity of the administrative procedure on a purely exceptional basis.

[21] The employer presents a secondary argument in support of its objection to an adjudicator's jurisdiction, claiming that the grievors' grievances cannot validly be referred to adjudication under paragraph 209(1)(*a*) of the *Act*, which stipulates the following:

> ***209****.(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*

[22] The employer claims that the grievors' allegation that the employer contravened clause 18.01 of the collective agreement cannot be used as the basis for individual grievances because it does not confer substantive rights to employees. That clause reads as follows:

> ***18.01*** *The Employer shall make reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Bargaining Agent, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.*

[23] The employer considers that provision consistent with the provision at issue in *Canada (Attorney General) v. Lâm*, 2008 FC 874, and that the reasoning applied by the Federal Court in that matter must apply in this case. In *Lâm*, the employee alleged that she had been harassed and based her grievance in part on article 1 of her collective agreement, which read as follows:

> *1.01 The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the Alliance and the employees and to set forth herein certain terms and conditions of employment for all employees described in the certificate issued by the Public Service Staff Relations Board on June 7, 1999 covering employees in the Program and Administrative Services Group.*
>
> *1.02 The parties to this Agreement share a desire to improve the quality of the Public Service of Canada and to promote the well-being and increased efficiency of its employees to the*

> *end that the people of Canada will be well and efficiently served. Accordingly, they are determined to establish, within the framework provided by law, an effective working relationship at all levels of the Public Service in which members of the bargaining units are employed.*

[24] The adjudicator seized with the grievance allowed it, but the Federal Court overturned his decision and found as follows with respect to the scope of article 1 of the collective agreement in question:

. . .

> *[27] The adjudicator properly found that article 19 of the collective agreement does not apply in this case because it does not mention personal harassment. However, by deciding that the Treasury Board harassment in the workplace policy is consistent with the objectives of article 1 of the collective agreement, he misinterpreted the article and exceeded his jurisdiction. Furthermore, his decision is unreasonable.*
>
> *[28] Article 1 of the collective agreement is a general clause, an introduction or a preface that does not grant any substantive right to employees. There is nothing in the collective agreement that could support the finding that it was meant to include the Treasury Board policy.*

. . .

[25] The employer also bases its arguments on *Galarneau.* The employer sees a parallel between that case and the matter before me and urges me to decline jurisdiction as the Federal Court did with respect to its jurisdiction.

[26] The employer also referred me to *Spacek v. Canada Revenue Agency*, 2006 PSLRB 104, and *Parsons et al. v. Treasury Board (National Defence)*, 2004 PSSRB 160, in which the adjudicators found that clauses in the collective agreements in those cases similar to clause 18.01 of the collective agreement did not confer any substantive and individual right and could not be used as the basis for individual grievances.

B. For the grievors

[27] The grievors responded to each of the employer's arguments. First, they argue that, to remove the right to grieve in a case involving a violation of the collective agreement, the situation must be clear and obvious. In this case, subsection 208(2) of the *Act* does not apply because the administrative recourse provided in each of the three statutes invoked by the employer have a different purpose than that of the grievances and offer remedies that differ from those sought in the grievances filed.

[28] With respect to the *GECA*, the grievors claim that the allegations and redress sought by their grievances do not fall within its parameters. The purpose of the *GECA* is compensating employees who suffered an employment accident or industrial disease. In this case, the grievors do not claim to have suffered an employment accident or industrial disease, and no medical evidence attesting to such a diagnosis was presented. In their grievances, the employees allege that exposure to second-hand smoke causes them undue health risks, stress, tension, worry, inconvenience and discomfort. They are not at all claiming that they have suffered an employment accident and are not seeking payment of the compensation provided in the *GECA*.

[29] With respect to the *NSHA*, the grievors argue that do not seek, through their grievances, to trigger the penal mechanism or the redress measures provided in that statute. The grievors seek remedies through their grievances that are different from those provided in the *NSHA*.

[30] The grievors apply the same reasoning to the *Code*. They argue that they are not seeking the redress provided under the *Code* and that they did not exercise the right provided under the *Code* to refuse to work in case of danger.

[31] Therefore, the grievors argue that subsection 208(2) of the *Act* may not remove their right to file grievances that are otherwise based on the application and interpretation of the collective agreement. In their grievances, the grievors allege that, by exposing them to second-hand smoke and not taking action to eliminate second-hand smoke in the workplace, the employer is violating clause 18.01 of the collective agreement.

[32] In response to the employer's secondary argument, the grievors argue that clause 18.01 of the collective agreement clearly confers substantive and individual

rights and that a violation of it may be used as the basis for their grievances. The grievors claim that clause 18.01 differs from the purely declaratory provisions that were at issue in *Lâm* and the provisions similar to those provisions that are found in most collective agreements. They further argue that the terms of clause 18.01 are clear and that they must be given their full meaning. The grievors urge me to retain the interpretation given to that clause by the Ontario Court of Appeal, which acknowledged its substantive nature in *Gaignard v. Canada (Attorney General)*, 2003 CanLII 40299.

[33] Like the employer, the grievors invoke *Galarneau* and argue that the Federal Court recognized that a grievance was the appropriate recourse for addressing an allegation of a violation of clause 18.01 of the collective agreement. Counsel for the grievors pointed out that, in that case, the same employer argued in favour of the adjudicator's jurisdiction, while it now argues that an adjudicator does not have jurisdiction. The grievors further submit that, in *Galarneau*, the Federal Court implicitly recognized the substantive nature of clause 18.01 by comparing it to section 124 of the *Code*.

[34] In addition, the grievors argue that they may, as part of a grievance, claim that the employer violated the collective agreement and public statutes, without seeking the specific redress provided by the statutes. The grievors claim that invoking violations of public statutes does not cause an adjudicator to lose jurisdiction if he or she otherwise has jurisdiction with respect to the purpose of the grievance.

[35] The grievors add that the provisions of the *NSHA*, the *Canadian Charter of Rights and Freedoms* and the *Code* are presumed incorporated in the collective agreement and that, therefore, they can be used as the basis for their grievances. In support of their arguments, the grievors rely on the principles set out by the Supreme Court in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324,* [2003] 2 S.C.R. 157.

III. Reasons

[36] The special characteristic of the federal labour relations regime is that Parliament clearly stipulated those matters that may be the subject of a grievance and the circumstances in which a grievance may be referred to adjudication. The matters

that may be the subject of a grievance are specified in subsection 208(1) of the *Act* as follows:

> ***208.****(1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved*
>
> *(*a*) by the interpretation or application, in respect of the employee, of*
>
> *(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or*
>
> *(ii) a provision of a collective agreement or an arbitral award; or*
>
> *(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

[37] However, there is an important limitation on the right to file a grievance: that right exists "[s]ubject to subsections (2) to (7) . . ." of section 208 of the *Act*, and subsection 208(2) of the *Act* removes from an employee the right to file a grievance ". . . in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*." A similar limitation is set out in clause 20.02 of the collective agreement, which excludes the recourse of a grievance ". . . where there is another administrative procedure provided by or under any Act of Parliament to deal with the employee's specific complaint . . .", meaning that the administrative procedure for redress applies exclusively and is mandatory.

[38] Section 209 of the *Act*, for its part, sets out the conditions under which an employee may refer a grievance to adjudication. To be referred to adjudication, a grievance must first have been validly filed within the meaning of section 208, in accordance with section 225.

[39] Therefore, I will first examine whether subsection 208(2) of the *Act* must be applied in this case to prevent the grievors from filing grievances. In that regard, I must determine whether an administrative procedure for redress is available to the grievors under another Act of Parliament. If an Act of Parliament provides an administrative procedure to obtain redress with respect to the essential elements of a grievance, the grievors may not file grievances and must avail themselves of the

administrative procedure provided in the statute in question to obtain redress. While that provision, which exists to avoid a multiplicity of recourses, must be applied when the prescribed conditions are met, it nevertheless constitutes an exception to the right to file a grievance. Consequently, the adjudicator must ensure that the conditions for its application have truly been met.

[40] The principle of exclusive application of the administrative procedure existed under the former *Act*. Its subsection 91(1) reads as follows:

> ***91.****(1) . . . in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.*

[41] Since the substance of subsection 91(1) of the former *Act* is the same as that of subsection 208(2) of the *Act*, it is my view that the case law developed under that provision is relevant to interpreting subsection 208(2) of the *Act*. I draw the following principles from that case law.

[42] To determine whether another administrative procedure is provided, the adjudicator must identify the purpose of the dispute and determine whether it may reasonably and effectively be dealt with under the administrative procedure. The adjudicator must consider the essence of the grievors' allegations to determine the purpose of the grievance. The limitation on filing a grievance will apply if the administrative procedure can deal with the main issues raised by the grievance and not with secondary or accessory issues. If an administrative procedure exists, the recourse and remedies available under the grievance process and under the administrative procedure do not have to be identical, but the administrative procedure must provide the grievor with a real and beneficial remedy.

[43] On the last point, the Federal Court stated the following in *Mohammed v. Canada (Treasury Board)*, 1998 CanLII 7997 (F.C.):

> . . .
>
> *[27] From the words of Mr. Justice Linden it appears that the administrative procedure for redress referred to in subsection 91(1) does not have to be identical to the grievance procedure mandated by the* PSSRA. *In addition,*

> *the remedies given in the two procedures do not have to be identical; rather the party should be able to obtain "real redress" which could be of benefit to the complainant. All that is required under subsection 91(1) is the* existence *of another procedure for redress, where the redress that is available under that procedure is of some personal benefit to the complainant.*
>
> . . .

[44] Applying those principles to the grievances before me, I must first determine the essence of the grievances filed by the grievors, who state various reproaches against the employer. They allege that the employer is illegally exposing them to second-hand smoke, that it is violating the collective agreement and that it is not taking the necessary measures to eliminate second-hand smoke from their workplaces.

[45] The grievors further claim that this situation, created by the employer, is causing them health risks, health problems, stress, tension, worry, inconvenience and discomfort.

[46] The grievors seek the following two types of redress: an order to force the employer to take the necessary measures to eliminate second-hand smoke from their workplaces and the awarding of damages for physical and psychological harm, as well as punitive damages.

[47] Let us now examine whether the administrative procedures invoked by the employer can be considered recourse for redress with respect to the allegations in the grievances and the remedies sought.

[48] The employer first invoked the recourses under the *GECA*. The purpose of the *GECA* is set out in section 4, which states the following:

> ***4.*** *(1) Subject to this Act, compensation shall be paid to*
>
> *(*a*) an employee who*
>
> *(i) is caused personal injury by an accident arising out of and in the course of his employment, or*
>
> *(ii) is disabled by reason of an industrial disease due to the nature of the employment; and*
>
> *(*b*) the dependants of an employee whose death results from such an accident or industrial disease.*

> *(2) The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who*
>
> *(*a*) are caused personal injuries in that province by accidents arising out of and in the course of their employment; or*
>
> *(*b*) are disabled in that province by reason of industrial diseases due to the nature of their employment.*
>
> . . .

[49] Crown immunity is enacted in section 12 of the *GECA* as follows:

> ***12.*** *Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.*

[50] In their grievances, the grievors claim that exposure to second-hand smoke caused them health risks and health problems, but they do not claim to have suffered an employment accident or to have become disabled because of an industrial disease. Nor are they claiming the compensation provided under the *GECA*. The purpose of the *GECA* is clearly limited to situations in which employees have suffered an employment accident or have become disabled because of an industrial disease. In this case, the grievors' allegations, even if deemed proven, do not fall within the parameters of the *GECA*. Therefore, I do not see how the compensation mechanism provided in the *GECA* could be considered as an administrative procedure that could provide the grievors in this case with real and beneficial redress.

[51] The employer also invoked the application of the *NSHA*. It is true that, in their grievances, the grievors claim that the employer's conduct constitutes a violation of that statute. However, the remedy sought by the grievors differs completely from that provided in the *NSHA*. Although the redress provided by the administrative procedure and the redress that could be granted under a grievance do not have to be identical, the redress provided under the administrative recourse must have some connection to

the remedy sought by the grievors for the exclusivity of the administrative procedure to apply. The grievors seek an order to eliminate second-hand smoke from their workplaces and claim damages to compensate for the harm they allege to have suffered from their exposure to second-hand smoke. I do not believe that applying the penal measures provided in the *NSHA* could offer the grievors effective and beneficial redress because it would not result in an order being issued to eliminate second-hand smoke or allow any form of damages to be awarded. Furthermore, I believe that there is nothing preventing a violation of the collective agreement from also constituting a violation of statutes related to the same matters.

[52] This leaves the *Code*, the purpose of which is occupational health and safety prevention. The *Code* provides employees with various mechanisms to ensure compliance with the rights and obligations that it sets out. Section 124 of the *Code* sets out the general duty for the employer to ensure the protection of the occupational health and safety of its employees. Section 125, for its part, provides for more specific obligations, but none of them applies to the circumstances of this case. There are two principal mechanisms provided to employees in the event of an alleged violation by the employer of its obligations under the *Code*: the right to refuse to work if there is danger and the right to make a complaint.

[53] The right to refuse to work if there is danger is provided in section 128 of the *Code*. In this case, the employees did not refuse to work and did not claim to want to exercise a right to refuse to work. Therefore, I consider that, in this case, the right of refusal cannot be considered an administrative procedure for redress within the meaning of subsection 208(2) of the *Act*. In this context, I do not consider the decision rendered in *Foster* useful in any way.

[54] However, I believe that the *Code* offers other mechanisms that could have dealt with the grievors' allegations and that provide redress measures that could include an order of the nature sought by the grievors in their grievances.

[55] As previously mentioned, section 124 of the *Code* imposes a general duty on the employer to ensure the health and safety of its employees. The *Code* provides recourse to an employee who believes on reasonable grounds that there has been a contravention of Part II of the *Code*. That recourse begins with making a complaint to the employee's supervisor (section 127.1) that must be investigated. The complaint

may be referred to the health and safety officer if the employer does not agree with the findings of the investigation or if the employer has failed to take the necessary action to resolve the matter raised in the complaint (subsection 127.1(8)). The health and safety officer then conducts an investigation and has a number of powers, notably those set out in section 145, which states the following:

> *Direction to terminate contravention*
>
> ***145.*** *(1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to*
>
> *(*a*) terminate the contravention within the time that the officer may specify; and*
>
> *(*b*) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.*
>
> . . .
>
> *Dangerous situations — direction to employer*
>
> *(2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,*
>
> . . .

[56] Decisions rendered by the health and safety officer may be appealed to an appeals officer under section 145.1 of the *Code*.

[57] In my opinion, the scope of subsection 145(1) of the *Code* is sufficiently broad to allow a health and safety officer to investigate and determine whether the general duty of the employer to ensure the health and safety at work of its employees has been violated and, if so, to issue whatever direction the officer deems appropriate to terminate the contravention. In the circumstances of this case, I believe that a health and safety officer would have jurisdiction to investigate to determine whether the grievors are being exposed to second-hand smoke in their workplaces and, if so, whether that exposure contravenes the employer's duty as provided in section 124. In the affirmative case, the health and safety officer could issue whatever direction he or she deems appropriate to the employer to force it to eliminate the second-hand smoke.

Therefore, I am of the view that, *a priori*, the complaint mechanism provided in section 127.1 and subsequent sections constitutes an administrative procedure for redress that covers the main allegations raised in the grievances.

[58] However, I must also determine whether that procedure offers real and beneficial redress to the grievors. In my opinion, the procedure could ultimately lead to an order forcing the employer to eliminate second-hand smoke in the grievors' workplaces, but it could not lead to awarding damages. In their grievances, the grievors seek two remedies: an order to eliminate the second-hand smoke and the awarding of damages.

[59] I do not believe that the grievors' claims for damages can be considered accessory or secondary elements of the grievances. The grievors seek two remedies: one having a prospective perspective, which is the elimination of the second-hand smoke for the future, and the other involving compensation for harm allegedly already suffered. I do not see on what basis less importance or value can be attributed to the claim for damages or on what basis it could be deemed a secondary element.

[60] To conclude in this case that the complaint mechanism constitutes an administrative procedure for redress within the meaning of subsection 208(2) of the *Act* would amount to depriving the grievors of the right to claim damages if it is established that the employer violated the collective agreement. I believe that such an interpretation of subsection 208(2) of the *Act* would unduly limit the right of the grievors to have their allegations heard. For that reason, I conclude that the complaint mechanism provided in the *Code*, although useful for determining whether the employer violated its duty to ensure the protection of its employees' health and safety under section 124 of the *Code*, does not provide a redress measure as complete and beneficial as the grievances because it does not cover a key component of the redress sought by the grievors. In that regard, I believe that the complaint mechanism does not offer redress that is sufficiently comprehensive to be deemed real and beneficial for the grievors. Therefore, I conclude that, in this case, the grievors could rightly file their individual grievances under subsection 208(1) of the *Act*.

[61] Without presuming to prejudge the merits of the grievances at this point, I must point out that the grievors' right to have their allegations heard through the grievance process will not allow them to indirectly claim compensation of the nature set out in

the *GECA*. Thus, the grievors would not be able to rely on the allegation in their grievances that they suffered "health problems" and "physical and psychological harm" to indirectly seek compensation of the nature provided in the *GECA*. The *GECA* excludes the jurisdiction of an adjudicator to compensate employees if the cause of the damages sought is an employment accident or industrial disease.

[62] I will now consider the secondary argument adduced by the employer that, even if the grievors could file their grievances under section 208 of the *Act*, the grievances could not be referred to adjudication under paragraph 209(1)(*a*), which reads as follows:

> ***209.****(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> > *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*

[63] The employer argues that clause 18.01 of the collective agreement does not confer any substantive right to the grievors and that it may not be used as the basis for individual grievances.

[64] Clause 18.01 of the collective agreement reads as follows:

> ***18.01*** *The Employer shall make reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Bargaining Agent, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.*

[65] The employer relies on *Spacek, Parsons* and *Lâm*. *Spacek* and *Parsons* involve clauses similar to clause 18.01 of the collective agreement in this case. The adjudicators in those cases concluded that the clauses should be read in their entirety and that their purpose was to impose on the parties the obligation to work together on health and safety. However, the adjudicators concluded that the clauses did not impose specific obligations on the employer toward its employees individually. Therefore, the adjudicators found that the provisions did not confer individual rights

on the employees and that only the bargaining agent could complain about a violation by the employer of its obligations. With all due respect, I do not agree with that interpretation.

[66] In my opinion, the first sentence of clause 18.01 of the collective agreement clearly creates for the employer a substantive duty to each of its employees: the employer shall make reasonable provisions for the occupational safety and health of employees. Although the duty is expressed in general terms, it is in my view a no less substantive commitment, the scope of which extends to each of the employer's employees. In the second sentence of the clause, the parties set out the means by which they agree to ensure that the duty in the first sentence is met. To enable the employer to meet its duty to make reasonable provisions to protect the health and safety of its employees, the parties commit to consult and to work together to carry out the necessary procedures. I do not see on what basis this second element of the clause should eclipse the employer's duty, and the corollary right of employees, provided in the clause's first sentence.

[67] Indeed, I believe that the main purpose of clause 18.01 of the collective agreement is found in the employer's duty, which is stated in the clause's first sentence, while the second sentence provides for the mechanisms to ensure that the duty is met. The mechanisms, created in the form of respective undertakings by the employer and the bargaining agent, are not exclusive and do not have the effect of reducing the substantive nature of the duty clearly established in the clause's first sentence. Furthermore, I see nothing that would prevent the parties from setting out in a single clause both a duty for the employer to its employees and mutual obligations for the employer and the bargaining agent. With all due respect, it is my position that concluding that clause 18.01 does not confer individual rights on employees constitutes an overly restrictive interpretation that voids the meaning of the clause's first sentence.

[68] The employer's duty set out in the first sentence of clause 18.01 of the collective agreement appears to me to be of the same nature as that provided in section 124 of the *Code*. In *Galarneau*, the Federal Court first addressed the question of the substantive nature of clause 18.01 of the collective agreement and the jurisdiction of adjudicators in that regard, without actually deciding the question.

[69] In *Galarneau*, it is the plaintiff (on behalf of the grievors) who argued that the Federal Court had jurisdiction, notably because clause 18.01 of the collective agreement did not confer on her an individual right and could not be used as the basis for a grievance. The plaintiff's position was based on two decisions rendered by the Board's adjudicators. Without definitively ruling on the matter of whether clause 18.01 conferred an individual right and could be used as the basis for a grievance, the Court expressed reservations about the case law developed by the adjudicators and drew an interesting parallel to section 124 of the *Code*. The Court commented as follows:

. . .

> *[31] As I said earlier, the plaintiff states that she cannot avail herself of the grievance procedure in her collective agreement because clause 18.01 does not give her any individual right and she cannot complain of its application in regard to her (subparagraph 91(1)*(a)*(ii)).*
>
> *[32] She bases her interpretation on two decisions of the Public Service Staff Relations Board . . . .*
>
> *[33] In its cases, the Board held that it did not have jurisdiction to hear the grievances of employees who said they were aggrieved by a breach of the duty to ensure their health and safety under provisions in their collective agreement similar to clause 18.01. According to the Board, these provisions only create rights between the parties to the collective agreement, i.e, the employer and the union. That is why, in* Labelle, supra, *the Board held that it only had jurisdiction to hear the grievance of principle filed by the union under section 99 of the PSSRA.*
>
> *[34] It is not easy to understand the Board's reasoning, since its decisions are succinct on this point. Basically, the Board in* Labelle *adopts the finding in* Alb, supra, *and it seems that in* Alb, *the Board narrowly construed the first sentence in this provision, dealing with the employer's duty, because the second sentence refers to suggestions by the bargaining agent.*
>
> *[35] However, the language of clause 18.01 and of the provisions examined in these cases is very similar to that in section 124 of the* Canada Labour Code, *imposing a general obligation on employers in respect of each of their employees, and reading as follows:*
>
> > *124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.*

. . .

> *[36] The defendants submit that these decisions have not been followed and that the Ontario Court of Appeal has now settled this issue in* Gaignard v. Canada (Attorney General), *[2003] O.J. No. 3998 (C.A.) (QL*). . . .
>
> *[37] The plaintiff's argument does not appear to have been presented to the Ontario Court of Appeal in* Gaignard, supra. *And the Court must bear in mind the deference that the courts grant to the Board, which has been described many times as the expert on such matters.*
>
> *[38] So although it is quite probable that the interpretation adopted by the Ontario Court of Appeal will be followed, particularly in light of the language of section 124 of the* Canada Labour Code *and the large and liberal interpretation that is generally given to collective agreements, the Court cannot conclude that the plaintiff's position has no chance of success.*
>
> *[39] The Court will therefore examine whether its jurisdiction is excluded regardless of the interpretation that is given to clause 18.01, as the defendants submit.*
>
> . . .
>
> [Emphasis in the original]

[70] In *Gaignard*, the Court of Appeal for Ontario recognized the substantive nature of clause 18.01 of the collective agreement. However, it should be noted that *Gaignard* does not appear to have been invoked in *Spacek* and *Parsons*. In *Gaignard*, correctional officers working at the Kingston Penitentiary were members of the same bargaining unit as the grievors in this case and were subject to the same collective agreement. They launched a civil suit against the Attorney General of Canada in which they claimed that, during an operation to stop the flow of contraband among the inmates, the employer had adopted methods that poisoned the atmosphere at the penitentiary and put their lives at risk. The Court was required to rule on its jurisdiction to hear the dispute. Concluding that the dispute should be resolved by an adjudicator, the Court of Appeal commented as follows:

. . .

> *[23] The facts raise a complaint by individuals who are acknowledged to be covered by the collective agreement. Their complaint is against their employer and its executive*

> *team and concerns the way the workplace was run by management. The facts centre on an alleged covert operation to stop contraband entering Kingston Penitentiary which employed methods that the appellants say poisoned their work environment and caused them physical and emotional harm. These allegations clearly engage the employer's obligation in Article 18 of the collective agreement to make reasonable provisions for the occupational safety and health of the employees.*
>
> *[24] The same reasoning makes it equally clear that the ambit of Article 18 extends to the facts which the appellants say underpin this dispute. The employer's obligation under the collective agreement to maintain a safe workplace is directly implicated by the covert operation and its consequences for the appellants as described in the statement of claim.*
>
> *[25] If this dispute were arbitrated and a breach of the collective agreement were established, the remedy at arbitration would undoubtedly include compensation to injured employees who grieved. That would remedy the wrong in very much the same way as would an award of damages in a court action. There would be no deprivation of ultimate remedy.*
>
> *[26] Finally, looked at holistically, it seems to me that this is precisely the kind of dispute that the parties intended to be finally resolved by arbitration when they agreed to Article 18. The facts involve a workplace dispute between union members and management. The collective agreement sets out an obligation that fits the problem with some precision. And arbitration can provide an effective remedy. In these circumstances, the essential character of the dispute entails that the principle of exclusive jurisdiction apply. The court thus has no power to entertain an action based on this dispute.*
>
> . . .

[71] Therefore, I conclude that clause 18.01 of the collective agreement confers substantive rights on the grievors and that it can rightly serve as the basis for individual grievances.

[72] Finally, I believe that clause 18.01 of the collective agreement differs from the declaratory clauses at issue in *Lâm*. The clauses at issue in that case provided for mutual obligations for the employer and bargaining agent, without providing any commitment with respect to employees individually. It is my position that the situation

is quite the contrary in the case of clause 18.01 and that, accordingly, no useful parallel can be drawn to this case.

[73] For all of the above reasons, I make the following order:

(The Order appears on the next page)

IV. Order

[74] The employer's objection to an adjudicator's jurisdiction is dismissed.

[75] The parties will be called to a hearing of the grievances on their merits.

June 8, 2009.

PSLRB Translation

Marie-Josée Bédard,
adjudicator

V. Appendix

PSLRB File No.	Grievors
566-02-122	Galarneau, Hélène
566-02-123	Desjardins, Michel
566-02-124	Gauthier, André
566-02-150	Percy, Joëlle
566-02-151	Perreault, Raymond
566-02-152	Rolland, Richard
566-02-153	Tremblay, Danny
566-02-154	Charbonneau, François
566-02-155	Dorvil, Yves-Marie
566-02-168	L'Italien, André
566-02-224	Alarie, Sonia
566-02-225	Sénécal, Pierre
566-02-226	Langlois, Jean
566-02-227	Lecault, Jean-Pierre
566-02-228	Lagacé, Rolland
566-02-229	Zomor, Jean-Gérald
566-02-230	Leroux, Martin
566-02-231	Denis, Pierre-Richard
566-02-232	Kalinowski, Christian
566-02-233	Querry, Luc
566-02-234	Mastrocola, Francesco
566-02-235	Jean-René, Renald
566-02-236	Vaillancourt, Guy
566-02-237	Leveillé, Martin

566-02-238	Doucet, Pierre
566-02-239	Godin, Michel
566-02-240	Venne, Denis
566-02-241	Pelletier, Gilles
566-02-242	Mongrain, Louise
566-02-243	Brien, Jean-Paul
566-02-244	Brunelle, Patrick
566-02-245	Dufour, Yves
566-02-246	Boulanger, Jean-Yves
566-02-247	Gilbert, Daniel
566-02-248	Renaud, Gilles
566-02-249	Tardif, Marylène
566-02-250	Soubyran, Christian
566-02-251	Morin, Bernard
566-02-274	Gardner, Jocelyn
566-02-275	Tremblay, Roger
566-02-277	Francoeur, Eugène
566-02-383	Cusson, André
566-02-384	Bartucci, Sandro
566-02-385	Carroll, Daniel
566-02-386	Tremblay, Madeleine
566-02-387	Labrecque, Maurice
566-02-388	Ethier, Guy
566-02-389	Poulin, Josée
566-02-390	Lafontaine, Michel
566-02-391	Lapierre, Gaston

566-02-392	East, Michel
566-02-393	Langlois, Raymond
566-02-394	Laroche, Réjean
566-02-425	Vallée, André
566-02-554	Fortin, France
566-02-555	Roy, Aldo
566-02-556	Ouellet, Pierre
566-02-557	Martel, Mario